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No. 96 220 JUN 6 1996

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1995

DANIEL P. ALLEN,

Petitioner,

against

UNISON TRANSFORMER SERVICES, INC., REED H. FREEMAN PRES. UNISON, & UNION CARBIDE CHEMICALS & PLASTICS CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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82 pp

QUESTIONS PRESENTED

1. Whether the Summary Judgment Order granted to Respondents by the District Court and affirmed by the Court of Appeals was error, since it resulted from a "prediction" that the New Jersey Supreme Court would decree preemption by the New Jersey Law against discrimination of certain wrongful discharge claims?

2. Was the District Court in effect "making laws" since the United States Supreme Court held that the judicial decisions as well as statutory laws, are the laws of several states within the meaning of the "Rules of Decision Act?" (Erie R. Co. v. Tompkins 1938)58S.Ct817.

3. On a motion for summary judgment, if a question of fact exists concerning the existence of a defense, can the issue be determined by an affidavit?

4. Is the Plaintiff entitled to a decision on a disputed question of law which is evident from the allegations of the complaint?

5. Is a statement by the court in its "Opinion" that while such evidence is an attempt to mislead the E.E.O.C. might support a claim of pretext sufficient to credit an inference of pretext applicable to Petitioners Age Discrimination claim?

6. Did the District Court err in resolving the contested issues of fact relative to a Petitioners Wrongful Discharge Claim?

7. Does the Petitioner have a property right to his labor which cannot be assigned with the properties of his employer via an Asset Purchase Agreement?

8. Were the Constitutional Rights of Liberty and Freedom of Petitioner infringed?

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Petition for a Writ of Certiorari

Petitioners, Daniel P. Allen respectfully request the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, as amended, in connection with this proceeding.

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Statement of Jurisdiction

The Court of Appeals entered its judgment in this action on January 31, 1996, and denied cross petition for rehearing on March 8, 1996. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes and Rules

28 U.S.C. §1291
28 U.S.C. §1331
28 U.S.C. §1332
28 U.S.C. §1746
Fed. R. Civ. P. 56(c)
NJLAD
NJSA 10:5-12
U.S. Constitution
N.J. Constitution

Statement of the Case

Unison transformer Services, Inc. was formed in June of 1985 as a wholly owned subsidiary of Union Carbide Corp. In October of 1985, Petitioner was hired as an Account Executive to market the services and processes of Unison. In mid 1988 Union Carbide Crop (UCC) was granted a patent for their retrofilling process. UCC promptly served notice on ENSR Corp. (a competing retrofiller)) that the ENSR process was infringing on the UCC patent. ENSR denied any and all claims by UCC, which then filed a law suit against ENSR. This case never went to trial. However, it formed the nucleus of the August 7, 1991 "Asset Purchase Agreement," which has led to the case at hand.

As part of the above transaction, Unison sold the patent rights for retrofilling, assigned all open retrofill service contracts to ENSR, together with the various Regional Service Centers, complete with all vehicles and service equipment. Included in the Asset Purchase agreement were approximately one hundred and forty employees who were transferred to ENSR. Of these employees (from the service group), four performed sales functions as Account Executives.

Unison was managed as a single entity, with no autonomous divisional components. Therefore, what Unison sold to ENSR was patent rights, assets and novated contracts. ENSR, as a competitor, had a full complement of sales personnel selling their "System 50." A table of organization which was sent by ENSR to Petitioner regarding their expectation that he (Petitioner) would enter their employ, indicated the Unison "Reclass 50" process for PCB decontamination of transformers would not be marketed by ENSR.

Petitioner had a written offer of employment to market the services of Unison . The position was to be based in the Union City New Jersey area and cover a sales territory of New Jersey, Eastern and Central Pennsylvania and Delaware. The advertisement (in evidence) for this position appeared in the Newark Star Ledger in July 1985, clearly stated no relocation was necessary.

Petitioner believed the involuntary transfer of his employment to a former competitor to sell their process and services from another state (Pennsylvania) was a material breach of the employment agreement he had with Unison. Petitioner did not resign from Unison, nor did he voluntarily retire from Unison. The Petitioner claims wrongful discharge by Unison without cause by way of salary termination. The opposing factual contention of Respondents is that Petitioner became and ENSR employee.

A complaint was filed with the Equal Employment Opportunity Commission (EEOC) on the basis of age discrimination. Unison had retained in their employ a similarly situated individual, thirty-one years of age, who had been an integral part of the retrofill service business for almost six years prior to Unison divesting this service. This individual worked out of the Allentown PA service center and that service center with all of its attendant employees was assumed by ENSR in the Asset Purchase Agreement. That individual remained as an Account Executive in the sales territory Petitioner Previously covered. Since Petitioner was the only New Jersey based employee of Unison, Petitioner filed an individual disparaging treatment claim with the EEOC. The EEOC, relying on misinformation, found Petitioner was not treated less favorably than any similarly situated employee.

Petitioner brought suit on August 5, 1993, by filing a Complaint and Jury Demand in the Superior Court of New Jersey Law Division, Bergen County New Jersey. The Complaint alleges causes of Action against Respondents for Wrongful Discharge, material breach of the employment agreement, negligent misinformation and violation of New Jersey Law Against Discrimination and the Employment Act of 1967. The Complaint was removed to the United States District for the District of New Jersey and diversity jurisdiction was invoked pursuant to U.S.C.-1331.

At the close of discovery, Respondent filed a motion for Summary Judgment, which was granted by Order of the Honorable Nicholas H. Politan, dated November 30, 1994.

To secure the Summary Judgment, Respondents ignored the primary overments of the Wrongful Discharge Courts namely, a material breach of the employment agreement by Union. They reclassified the test and contract claims recognized under New Jersey law into a public policy claim which they claimed duplicated the Age Discrimination Count. It is incomprehensible to Petitioner how respondents could by osmosis convert a wrongful Discharge Claim into an age discrimination claim when age was not even mentioned in the court which was dismissed as a duplicate claim.

The District Court dismissed the Wrongful Discharge Court in three sentences: "Plaintiff contends that his termination was a wrongful discharge in violation of New Jersey public policy. Defendants argue that the public policy, if any, upon which plaintiff rests that claim is the self same policy which rails against unlawful discrimination and which has been embraced by the New Jersey legislature in the Law Against Discrimination." The Court so finds, and accordingly plaintiff's Wrongful

Discharge Claims are dismissed as duplicative of his age discrimination claim. See Butler v. Sherman, Silverstein, & Kohl - 755 F. Supp. 1259 (D.N.J. 1990)

As was pointed out in Plaintiff's Brief in Response to the Summary Judgment (Ja89) Butler v. Sherman Silverstein & Kohn PC, the NJ LAD claim preempted her common law claim for wrongful discharge, because her common law-claim and the NJLAD claim were both based on racial discrimination grounds. Plaintiff's Public Policy claim is not duplicative of his NJLAD claim since Constitutional Rights are not specifically addressed in the NJLAD. While the overments in the Wrongful Discharge Court could support more than one claim summary judgment under Rule 56 is only granted when there is no material fact in dispute and themovant is entitled to judgment as a matter of law.

Petitioner filed a Motion for Reconsideration on December 12, 1994, urging error in that express contract terms had been averred in the Wrongful Discharge Court; a specific location, for a particular service with the stipulation that relocation would not be necessary. "Since by no stretch of the imagination could Plaintiff substituted another to perform the services assigned to him by agreement, so neither could the employer substitute another in their stead. The Complaint at #19 alleges a material breach of the employment agreement, which Defendants deny."

Petitioner's motion for reconsideration was denied by Order dated March 31, 1995. A timely Appeal of the Summary Judgment Order and the Denial of the Motion for Reconsideration was filed in the United States Court of Appeals for the Third Circuit Petitioner pointed out the material facts which were in dispute based on the allegations of the Complaint and the answer there to by the Respondents, and the failure of the Respondents to address the allegations. By Order dated January

31, 1996 the Appeals Court affirmed the decision of the District Court. By notice dated February 14, 1996 Petitioner filed a Petition for rehearing which was denied on March 8, 1996.

Petitioner submits this Petition for review under Rule 10 (a) for the reasons herein enumerated.

Reasons for Granting the Writ

1. The improper assumption of a right reserved to the highest court of the State by a Federal District Court. The US District Court for N.J. in Butler V. Sherman Silverstein & Kohl, P.C. 755 Supp 1259 (1990) determined that the Plaintiff's common law claim alleging violation of New Jersey public policy must be dismissed for failure to state a claim. "Specifically, we ask whether the NJLAD preempts a common law claim of wrongful discharge on racial discrimination grounds. We find it does, therefore, we dismiss this claim. Although the New Jersey Supreme Court has not definitively answered this question the court has addressed the issue.

   The third circuit court next cited a prior ruling they had made by stating "Although the New Jersey Supreme Court has not definitely answered this question, the court has addressed the issue". In the absence of an authoritative pronouncement from the States highest Court, the task of a federal tribunal is to predict how that Court would rule. "Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Company 652Fed2d 1165 (3d Circuit 1981), "We predict that new Jersey would not allow a common law course of action for a wrongful discharge based on race discrimination. We base our prediction on several factors."

   After citing to the reason that "by enacting the NJLAD, the legislature of the State of New Jersey has already provided a remedy for plaintiff, and most importantly, a close reading of two recent cases, {Shaner and Horizon Bank Corp, 116NJ, 433, 561, 1989 indicates that the New Jersey Supreme Court does not intend to provide for a common law remedy to supplement the NJLAD}

The court then noted "Shaner Court" concluding statement: "Because the LAD provides a victim of age discrimination with a remedy it *might* be unnecessary to recognize or create a "Pierce type action to vindicate substantially the same rights and provide similar relief"

2. The Supreme Court ruled against such a practice in Erie R. Co. v. V. Tompkins id
"This Court and the lower courts have invaded rights which are reserved by the Constitution to the several States. It should be reaffirmed that the laws of the several States except where the Constitution, treaties or statues of the United States otherwise require or provide, shall be regarded as rules of decision...., in the courts of the United States, in cases where they apply."

3. Standard for Granting Summary Judgment a Court may grant a summary judgment only when the materials of record show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law? Fed rule CIV P 56(c), In deciding whether there is a disputed issue of material fact the court must review all doubts in favor of the non-moving party. Meyer v. Riegal Prod. Corp, 720 F2d 303, 307n 2 (3d Cir, 1983)

4. The Supreme Court of New Jersey in Erickson v. Marsh & McLennan Company 117 NJ 539 noted that the Appellate Division held in Erickson that the NJLAD does not preempt a common law claim for wrongful discharge based on sex discrimination. With a present opportunity on the Writ of Cretoria to revise the law, the NJ Supreme Court deferred a decision.

The Summary Judgment of Petitioners claim of wrongful discharge by the District Court was error. The case cited by the District Court, Butler v. Sherman, Silverstein & Kohl 755 F. Supp. 1259 (D. NJ 1990) to dismiss Petitioners, Wrongful Discharge Claim was a "prediction" by the District Court of how the NJ Supreme Court would rule, since a prediction is doubtful, it was error to dismiss Petitioner's claim of Wrongful Discharge on a doubt which should have been decided in his favor and which was a violation of the Supreme Court ruling in "Erie. id".

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted in order to allow this Court to consider the issues raised herein.

Respectfully submitted,

Daniel P. Allen

Dated: June 5, 1996
Union City, NJ

FILED
November 30, 1994

APPENDIX A - Order dated November 30, 1994

United States District Court
For the District of New Jersey

DANIEL P. ALLEN, Plaintiff,	:	CIVIL ACTION NO. 93-3747 HON. NICHOLAS H. POLITAN
v.	:	
UNISON TRANS-FORMER SERVICES, INC., et al, Defendants.	:	**ORDER**

THIS MATTER having come before the Court by way of a summary judgment motion by defendants Unison Transformer, Inc., Reed H. Freeman, and Union Carbide Chemicals & Plastics Co., Inc., seeking the dismissal of all of plaintiff Daniel P. Allen's claims against them; and the Court having thoroughly reviewed the submissions of the parties; and the Court having heard oral argument in the matter; and for good cause shown as set forth more fully in the accompanying Letter Option;

IT IS on this 30th day of November, 1994, **ORDERED** that defendants' motion for summary judgment is **GRANTED**, and that plaintiff's claims against defendants are hereby **DISMISSED**.

NICHOLAS H. POLLINATE
U.S.D.J.

FILED
November 30, 1994

APPENDIX B - Opinion Dated November 30, 1994

United States District Court
For the District of New Jersey

NOT FOR PUBLICATION

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

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Re: Daniel P. Allen
v. Unison Transformer Services, Inc., et al
Civil Action No. 93-3747 (NHP)

Dear Counsel:

This matter comes before the Court on a motion by the defendants, Unison Transformer Services, Inc. ("Unison"), Reed H. Freeman, President of Unison, and Union Carbide Chemicals & Plastics Co., Inc. (Union Carbide") for summary judgment on

plaintiff Daniel P. Allen's claim against them alleging, inter alia, age discrimination. This Court, having reviewed the submissions of the parties and having heard oral argument in the matter, shall grant defendants' motion and dismiss plaintiff's claims in their entirety.

Unison was formed in June of 1985 as a wholly owned subsidiary of Union Carbide for the purpose of providing services to certain private and governmental entities which were required by law to eliminate the use of polychlorinated biphenyls ("PCBs"). PCBs were once considered to be ideal for use in heat transfer fluids due to their unique physical and chemical proprieties, but fell into disrepute when their environmentally hazardous characteristics became widely known. Thus, the use of PCBs fell subject to governmental regulation. Unison was founded to help substitute for their use by exchanging PCBs with other heat transfer fluids (the "Retrofill Business"), or by otherwise altering existing PCB equipment (the "TransEnd and Retrofill Business").

On October 15, 1985, Unison hired plaintiff as an account executive/sales person. His job involved marketing and selling Unison's services and products. At that time, plaintiff was 56 years of age. His status was that of an at-will employee, and he had no formal employment contract. It is plaintiff's contention that the president of Unison informed him at that time that his activities on behalf of the company were to be focused in North Jersey and in eastern and central Pennsylvania, and that he was to be based in the Union City, New Jersey area.

Unison had competitors in the PCB substitution industry. One such market participant, ENSR Corp. ("ENSR"), a wholly owned subsidiary of American NuKem Corp., offered services similar to those provided by Unison. ENSR also catered to private and governmental entities affected by the government's PCB regulations. In 1988, Unison and ENSR crossed swords. Unison brought suit against ENSR, alleging patent infringement

in the process by which the latter reclassified PCBs. That litigation resulted in a settlement whereby Unison and ENSR entered into an Asset Purchase Agreement ("the Agreement"). As part of the Agreement, Unison sold its retrofilling patent rights to ENSR, as well as all its open retrofill contracts, its vehicles and service equipment. An integral part of the transaction was the Unison would also transfer some of its know-how, i.e., one hundred and forty of its employees, to ENSR.
Of those employees, five were in sales and the remainder were in the service aspects of the business. Plaintiff was one of the five[1].

The Agreement required that management of both companies determine, based on certain business considerations, which employees would be retained by Unison and which would be which employees would be retained by Unison and which would be transferred to ENSR. The criteria used centered on the need to ensure that each company be adequately staffed with properly trained and equipped personnel. The business needs of both companies had to be provided for, and the decision-making process involved the potential transferees' experience matched against the needs of each company. Geographic considerations were also taken into account.

The selection process was supervised by the president of Unison, Mr. Freeman, as well as other Unison representatives, and by Robert Anderson on behalf of ENSR. Some of the names tendered by Unison as candidates for transfer were rejected by tendered by Unison as candidates for transfer were

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[1] Subsequent to oral argument in this matter, plaintiff's counsel -- apparently at the behest of plaintiff -- sent a letter tot he Court suggesting that "Joining an employee to a personal property transfer violates the Thirteenth Amendment . . ." Counsel offered no support for this maxim, and the Court fails to see it significance in a matter wherein neither slavery nor involuntary servitude are in issue.

rejected by ENSR, and others were accepted. The final group included both men and women, and was composed of employees of all ages. Neither Unison nor ENSR considered age as a criterion in their choice of who should be transferred and who should remain with Unison. None of the transferred and who should remain with Unison. None of the transferred employees suffered and diminution in compensation nor any change in employee benefits. In plaintiff's case, however, his new position with ENSR required that he no longer report to the North Jersey location, but instead to an Eastern Pennsylvania location.

After the Agreement was consummated, plaintiff refused to make the transition to ENSR because he believed that he could not ethically peddle the wares of a Unison competitor -- services and products which he had previously dismissed as inferior to those of Unison. Plaintiff shared this concern with the president of Unison, defendant Freeman, on August 23, 1991. For a brief period during 1991, plaintiff was on the payroll of ENSR, but eventually he voluntarily resigned. He brought a claim against Unison before the Equal Employment Opportunity Commission alleging age discrimination, but the EEOC found that he had not been discriminated against.

Plaintiff has filed suit in this court against Unison, Reed H. Freeman and Union Carbide alleging that he was the victim of unlawful age discrimination. Defendants now move to have plaintiff's claim dismissed under Rule 56 of the Federal Rules of Civil Procedure.

Discussion

Rule 56 directs the court to enter summary judgment against a party which, after a sufficient period of time for discovery has elapsed, has failed to establish the existence of an essential element of its cause of action, and as to which that party bears

the ultimate burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Spangle v. Valley Forge Sewer Auth., 839 F. 2d 171, 173 (3d Cir. 1988). The purpose of summary judgment is to eliminate a trial where it is unnecessary and would only cause delay and expense to the court and the litigants. Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

Under Rule 56, summary judgment may only be granted if, drawing all inferences in favor of the nonmoving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See Chipollini v. Spencer Gifts, Inc., 814 F. 2d 893, 896(3rd Cir.), cert. dismissed, 483 U.S. 1052 (1987). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Celotex Corp, v. Catrett, 477 U.S. at 323. Once that burden has been met, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial," id. at 324, or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). The nonmovant must "do more than simply show that there is some that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Speculation, conclusory allegations, and mere denials are not enough to raise genuine issues of material fact.

Moreover, the mere existence of an alleged factual dispute will not defeat an otherwise properly supported summary judgment motion; rather, the opposing party must show a genuine issue of material fact to defeat the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., supra, 475 U.S. at 587 ("Where the record taken as a whole could not lead the trier of fact to find for the non-moving party, there is no 'genuine

issue for trial.'"). Facts are material only if they have the potential to affect the outcome of the lawsuit under the applicable law, and a dispute over material facts is genuine only if the evidence on the issue is such that a reasonable jury could return a verdict in favor of the non-moving party. Anderson, 477 U.S. at 247-48; EEOC v. Westinghouse Elec. Corp., 725 F. 2d 211, 218 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984). Thus, plaintiff's claims must be viewed in a favorable light by the court in a summary judgment context; however, the court must also be realistic in analyzing the potential for success of plaintiff's claims.

Plaintiff's discrimination claims in this matter are premised on a theory of age discrimination. The state courts of New Jersey and the federal courts are in agreement as to how age discrimination claims should unfold from a procedural perspective. This matter is controlled -- as to its federal age discrimination component -- by the three-step burden-shifting procedure established by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). The New Jersey Supreme Court has adopted this same approach to cases under the New Jersey Law Against Discrimination. Andersen v. Exxon Co., 89 NJ 483, 492 (1982); Goodman v. London Metals Exchange, Inc., 86 NJ 19, 31 (1981); Peper v. Princeton Univ. Bd. of Trustees, 77 NJ 55 82-83 (1978). Moreover, the Third Circuit has concluded that the New Jersey Supreme Court would adopt the recent changes in the Supreme Court's analysis of discrimination cases as set forth in St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993). See McKenna v. Pacific Rail Service, 32 FD. 3d 820 (3d Cir. 1994). Thus, the same analysis governs both plaintiff's federal and state discrimination claims.

The course which must be followed by the voyagers in an age discrimination suit has recently been plotted by the Third Circuit:

> Under the familiar McDonnell Douglas burden-shifting analysis applicable to federal employment discrimination cases involving indirect proof of discrimination, the plaintiff bears the burden of proving a relatively simple prima facie case, which the employer must rebut by articulating a legitimate, non-discriminatory reason for its actions. See generally Chipollini v. Spencer Gifts, Inc., 814 F. 2d 893, 897 (3d Cir. 1987) [footnote omitted]. Prior to Hicks, . . . a finding that a defendant employer had articulated false reasons mandated entry of judgment for plaintiff. Chipollini, 814 F. 2d 898; Duffy v. Wheeling Pittsburgh Steel Corp., 738 F 2 1393, 1395-96 (3d Cir. 1984). Hicks changed that: the court ruled definitely that a finding that an employer had articulated a pretextual reason for its actions does not mandate judgment for a plaintiff. Instead, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." Hicks, -- U.S. at ---, 113 S. Ct. at 2752. Thus, "[that the employer's proffered reasons for its actions] is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct." Id. at --, 113 S. Ct. at 2756 []. In our most recent decisions addressing this issue, we have followed the teaching that a finding of pretext may lead to a reasonable inference of discriminatory motives, but it does not automatically compel a finding of discrimination. (citations omitted)

McKenna, 32 F. 3d at 825-26.

Following that course in this matter, therefore, this Court must review plaintiff's claims and consider, based on the evidence available in this case, whether plaintiff can conceivable prevail in his claims of age discrimination.

In Hazen Paper Co. v. Biggins, --- U.S. ---, 123 L. Ed. 2d 338 (1993), the Supreme Court held, in the context of age discrimination, that "[i]n a disparate treatment case, liability depends on whether the protected trait actually motivated the employer's decision." 123 L. Ed.2d at 346. "Whatever the employer's decision-making process, a disparate treatment claim cannot succeed unless the employee's trait actually played a role in that process and had a determinative influence on the outcome." Id at 347. Stated differently, when an employer accused of age discrimination has rebutted plaintiff's prima facie case by evidence of legitimate reasons for the employer's conduct,

> to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a fact finder to reasonable infer that each of the employer's proffered non-discriminatory reasons (citations omitted) . . . was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext). (citations omitted).

Fuentes v. Perskie, 32 F. 3d 759, 764 (3d Cir. 1994).

To make out a prima facie case of discrimination, plaintiff must establish (1) that he is a member of a protected class; (2) that he was qualified for the position from which he was discharged despite his qualifications; and (4) that he was replaced by a person sufficiently younger than him to create and inference of discrimination. Healy v. New York Life Ins. Co., 860 F 2d 1209, 1214 (3d Cir. 1988), cert. denied, 490 US 1098 (1989).

In this case, plaintiff at oral argument contended that factual issues existing concerning his ability to meet certain of these four prima facie case criteria, and as such the court shall avoid conclusory determinations in this area. Nevertheless, the Court need not concern itself with this issue because there is ample opportunity for deciding the summary judgment motion on the

age discrimination claims based solely upon defendants' proffered legitimate reasons for its actions and upon plaintiff's ability to refute same.

Defendants claim that their decision to transfer plaintiff to ENSR was reached as part of a legitimate nondiscriminatory transfer of experienced employees in conjunction with its Agreement with ENSR. This, the properly assert, satisfies their burden of production by "introduce[ing] evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Hicks, supra, 113 S. Ct. at 2748. To counter this, and thereby prevent the entry of summary judgment, plaintiff must "point to some evidence in the record, in addition to the basic facts necessary to establish a prima facie case . . . from which a reasonable jury could conclude [that defendants'] explanation is incredible." Chauhan v. M. Alfieri Co., Inc., 897 F. 2d 123, 128 (3d Cir. 1990). At this point, therefore, "the burden of production rebounds to the plaintiff, who must now show by a preponderance of the evidence that the employer's explanation is pretextual (thus meeting the plaintiff's burden of persuasion." Fuentes, 32 F. 3d at 763.

Plaintiff, to survive summary judgment at this juncture, must do more than merely cite his age as the reason for the manner in which he was treated. Billet v. CIGNA Corp., 940 F. 2d 812, 816 (3d Cir. 1991). Absent sufficient evidence refuting the defendant's showing, this Court cannot second-guess defendant's otherwise valid management decision entered into in an apparently nondiscriminatory manner. Ezold v. Wolf, Block, Schoor & Solis-Cohen, 983 F. 2d 509, 527 (3d Cir. 1992), cert. denied, 126 L. Ed. 2d 56 (1993). speculation by the plaintiff and/or his opinion as to the reason why he was treated as he was -- namely, his membership in a protected class -- will not, by itself, suffice to protect him from summary judgment. Hankins v. Temple University, 829 F. 2d 437 (3d Cir 1987)l; Bellissimo

v. Westinghouse Elec. Corp., 764 F. 2d 175, 82 (3d Cir. 1985) cert. denied, 475 US 1035 (1986).

In this matter, defendants have brought forth evidence that plaintiff's transfer was part of a large scale transfer of employees from Unison to ENSR. In fact, at the time plaintiff was transferred, 139 other Unison employees were also transferred in tandem with the Asset Purchase Agreement between Unison and ENSR. Defendants have proffered evidence that the only criteria used in determining who should be transferred were business considerations focusing on the need to ensure that bother companies would be adequateiy staffed by properly trained and equipped personnel after the transfer was completed. The potential transferees' experiences were taken into consideration, as were geographical concerns.

The selection of the transferees was carried out by Mr. Freeman and by a representative of ENSR. The final group selected was composed of both men and women of all ages. None of the employees selected were to suffer any diminution in pay, nor were they to suffer in regard to their employee benefit packages. While plaintiff's new home base -- the office at which he would have to periodically report -- changes from one in New Jersey to one in Eastern Pennsylvania, there is no evidence to suggest that this was the result of any discriminatory design. Indeed, evidence exists that neither ENSR nor the defendants ever considered age as a determinant of their decision.[2] Plaintiff has provided no evidence to the contrary sufficient to convince this court that reasonable fact finders could conclude that these reasons proffered by the defendants

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[2] The Court notes that it is not incumbent upon the defendants to "prove the absence of discriminatory motive." Board of Trustees of Keene State College v. Sweeney, 439 US 24 (1978).

were either pretextual or merely post hoc fabrications. See Fuentes.

Plaintiff had an ethical problem resultant from his transfer. He believed that, in good conscience, he could not represent and promote the products and services of a Unison competitor. The merit or otherwise of this view by the plaintiff is not for this court to determine. However, suffice it to say that this reason for plaintiff's unwillingness to make the transition to ENSR and his eventual voluntary resignation from that company bodes ill in his present assertion that he was constructively discharged by Unison on the basis of age.

> The Third Circuit has recently recognized that[] "[A] plaintiff has the burden of casting doubt on an employer's articulated reasons for an employment decision." [] [citation omitted] . . . While this standard places a difficult burden on the plaintiff, "[I]t arises from an inherent tension between the goal of all discrimination law and out society's commitment to free decision making by the private sector in economic affairs." Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d [509,] 531 (3d Cir. 1992), cert. denied, 114 S. Ct. 88 (1993).

Fuentes, supra, 32, F. 3d at 765.

This court is satisfied, upon complete review of the record, that plaintiff has failed to meet his burden in this matter and, therefore, cannot survive this motion for summary judgment on the claims of age discrimination in violation of federal and state law. As such, those components of plaintiff's claims as against defendants must be dismissed.

Defendants content that plaintiff's other causes of action must also perish in the face of this summary judgment motion. The Court shall deal with each cause of action individually.

Plaintiff claims that defendants' conduct towards him amounts to negligent/intentional misrepresentation. The elements of such an action as recognized by the courts of New

Jersey are: (1) A material representation by the defendant tot he plaintiff of a presently existing or past fact; (2) Intent on the part of the defendant that the plaintiff rely on the representation; (3) Falsity of the representation; (4) Knowledge on the part of the defendant that the representation was false; (5) Belief on the part of the plaintiff that the representation is true; (6) The taking of action by the plaintiff in reliance upon the representation; (7) Consequent injury. The fourth of these elements need not be proven in order to prevail on the theory of equitable fraud. See Jewish Center of Sussex Co. v. Whale, 86 NJ 619, 624-25 (1981).

Plaintiff contends that defendants' Company Position Paper contained false and misleading information upon which the EEOC relied in reviewing Unison's conduct towards plaintiff. This, plaintiff alleges, adversely affected plaintiff's claims made to that review body, and led to the EEOC accepting Unison's denial of plaintiff's claim. See Plaintiff's Response to Initial Interrogatories, Answer No. 30. While such evidence -- an attempt to mislead the EEOC -- might serve to support a claim of pretext, it does not meet the elements of either equitable or intentional misrepresentation. Plaintiff, on these facts, cannot initially prove that the representations at issue were made to him, nor that defendants intended that he rely upon them. Failing this threshold, the Court need not consider the other elements necessary to sustain a claim of misrepresentation. As such, the misrepresentation claims must perish.

Plaintiff contends that his "termination" was a wrongful discharge in violation of New Jersey public policy. Defendants argue that the public policy, if any, upon which plaintiff reset that claim is the self same policy which rails against unlawful discrimination, and which has been embraced by the New Jersey legislature in the Law Against Discrimination, and which is embodied in the Age Discrimination in Employment Act. The Court so finds, and accordingly, plaintiff's wrongful discharge

claims are dismissed as duplicative of his age discrimination claims. See Butler v. Sherman, Silverstein & Kohl, 755 F. Supp. 1259, 1263-645 (D.N.J. 1990) (no reason create "public policy" claim duplicative of NJLAD prohibitions); Geraghty v. Township of Berkeley Heights, 259 NJ Super. 350, 359 (Law Div. 1990) ("The cause of action for a discharge violate of state law or public policy . . . is only recognized within the private employment relationship [] where different policy considerations are implicated and there is no separate statutory regulation."), affirmed, 259 NJ Super 327 (APP. DIV. 1992); Lutz, v. Royal Ins. Co.,245 NJ Super 480, 503 (app. div. 1991) (duplicative claim properly dismissed).

Plaintiff has demanded damages for emotional distress against defendants because of their conduct. For such a claim to survive as a matter of law, the complaint must establish that his "mental distress was so severe that no reasonable man could be expected to endure it." Buckley v. Trenton Saving Fund SO.c, 111 NJ 355, 368 (1988). See also Decker v. Princeton Packet, Inc., 116 NJ 418, 430, (1989). To prevail in this claim, plaintiff must point to conduct which is "so extreme and outrageous 'as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized (citations omitted), cert. denied, 488 US 899 (1988).

In the instant case, plaintiff's proofs with regard to his emotional distress claim amount to nothing more than subjective complaints grounded in the allegation that he was "devastated" and that his pride was bruised by defendants' conduct. See certification of Daniel P. Allen, 18. As such, an absent any evidence that defendants' conduct was outrageous and extreme -- beyond the bounds of social decency -- the Court must find plaintiff's claim for emotional distress to fail under the scrutiny demand in a summary judgment motion.

Plaintiff also demands punitive damages. Punitive or exemplary damages are a limited legal device designed to

"punish to wrongdoer, and to deter both the wrongdoer and others from similar conduct in the future." Fischer v. Johns-Manville Corp., 103 NJ 643, 657 (1986). Indeed, as with the justification underlying claims for emotional distress, punitive damages are generally limited to situations in which "'the wrongdoer's conduct is especially egregious.'" Id, at 654-55 (citations omitted).

> The type of conduct that will warrant the award of punitive damages has been described in various ways. There must be an intentional wrongdoing in the sense of an 'evil-minded act' or an act accompanied by a wanton and willful disregard of the rights of another." (citation omitted) "[T]he requirement may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences." (citation omitted) However one describes the conduct that will justify punitive damages, on thing is clear: "The key to the right to punitive damages is the wrongfulness of the intentional act." (citation omitted)

ID. at 655.

In this matter, plaintiff claims that his transfer from Unison to ENSR along with 139 other employees warrants the award of punitive damages against the defendants. However, as set forth previously in this Letter Opinion, plaintiff has done nothing to establish that such a mass transfer was anything other than a business decision well within the discretion of any private sector business entity. As such, and since he cannot establish that the conduct of the defendants in transferring him was extreme or outrageous, plaintiff's claim for punitive damages must fail as a matter of law.

Based on the foregoing, defendants' motion for summary judgment is GRANTED and plaintiff's claims against them are DISMISSED.

An appropriate Order accompanies this Letter Opinion.

NICHOLAS H. POLITAN
U.S.D.J.

FILED
January 31, 1996

APPENDIX C - Judgment Order of Appeals Court
Order of Affirmation

United States Court of Appeals
For the Third Circuit

No. 95-5292

DANIEL P. ALLEN
Appellant
v.
UNISON TRANSFORMER SERVICES, INC.;
REED H. FREEMAN; UNION CARBIDE CHEMICALS
AND PLASTIC COMPANY, INC.

(Amended per the Clerk's 6/15/95 order)

Appeal form the United States District Court
for the District of New Jersey
(D.C. Civ. NO. 93-cv-03747)

Submitted Under Third Circuit LAR 34.1(a)
January 26, 1996
Before: Stapleton, Mansmann and Lewis, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,
Circuit Judge

FILED
March 8, 1996

APPENDIX D - Denial of Petition for Rehearing
March 8, 1996

United States Court of Appeals
For the Third Circuit

No. 95-5292

DANIEL P. ALLEN
Appellant
v.
UNISON TRANSFORMER SERVICES, INC.;
REED H. FREEMAN; UNION CARBIDE CHEMICALS
AND PLASTIC COMPANY, INC.

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA
COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE
and SAROKIN,
Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
Circuit Judge

APPENDIX E - Order Deny Motion for Reconsideration

United States Court of Appeals
For the District of New Jersey

DANIEL P. ALLEN, Plaintiff,	:	CIVIL ACTION NO. 93-3747
v.	:	HON. NICHOLAS H. POLITAN
UNISON TRANSFORMER SERVICES, INC., et al, Defendants	:	**ORDER**

THIS MATTER having come before the Court on plaintiff pro se[3] Daniel P. Allen's motion for reconsideration of the Court's decision filed on November 30, 1995 granting defendants' motion for summary judgment and dismissing plaintiff's claims; and the Court having decided the motion on the papers without oral argument pursuant to Fed.R.Civ.P. 78; and having fully considered the parties' submissions; and plaintiff having failed to indicate any dispositive factual matters or controlling decisions of law overlooked by the Court it is November 30, 1994 determination as prescribed by General Rule 12I; and the Court being satisfied that its previous decision was comprehensive and accurate;

[3]Mr. Allen is acting pro se for the purposes of this motion although he was previously represented by counsel prior to the dismissal of his claims on November 30, 1994.

IT IS on this 31st day of March , 1995,

ORDERED that plaintiff's motion for reconsideration be **DENIED**.

NICHOLAS H. POLITAN
U.S.D.J.

APPENDIX F - Order of Summary Judgment
November 30, 1994

DANIEL P. ALLEN, Plaintiff,	:	CIVIL ACTION NO. 93-3747 HON. NICHOLAS H. POLITAN
v.	:	
UNISON TRANSFORMER SERVICES, INC., et al, Defendants	:	**ORDER**

THIS MATTER having come before the Court by way of a summary judgment motion by defendant s Unison Transformer, Inc., Reed H. Freeman, and Union Carbide Chemicals & Plastics Co., Inc., seeing the dismissal of all of plaintiff Daniel P. Allen's claims against them; and the Court having heard oral argument in the matter; and for good cause shown as set forth more fully in the accompanying Letter Opinion;

IT IS on this 30th day of November, 1994,

ORDERED that defendant's motion for summary judgment is **GRANTED**, and that plaintiff's claims against defendants are hereby **DISMISSED**.

NICHOLAS H. POLITAN
U.S.D.J.

FILED
August 17, 1995
APPENDIX G - Appeals Court Reply Brief of Appellant

United States Court of Appeals
For the Third Circuit

No. 95-5292

DANIEL P. ALLEN

Appellant

v.
UNISON TRANSFORMER SERVICES, INC.;
REED H. FREEMAN; UNION CARBIDE CHEMICALS
AND PLASTIC COMPANY, INC.

REPLY BRIEF OF APPELLANT

On Appeal from the Final Order of the Honorable Nicholas H. Politan, Judge of the United States District Court for the District of New Jersey, Dated November 30, 1994, Granting Summary Judgment on No. 93-3747 (NHP)
Please accept this informal letter brief in reply to Appellees Brief and Supplemental Appendix-Statement of Issues presented for review.

1) Whether the District Court properly granted defendant's motion for summary judgment (and denied plaintiff's motion for reconsideration) on the wrongful discharge or termination in violation of a public policy. - Count One.

2) Whether the District Court properly granted defendant's motion for summary judgment in the negligent misrepresentation - Count Two, and denied plaintiff motion for reconsideration.

3) Whether the District Court properly granted defendant's motion for summary judgment in Plaintiff's Age Discrimination (and denied plaintiff motion for reconsideration) on the ground that plaintiff had failed to prove facts essential to his claim of Age Discrimination - Count Three.

Summary of Argument

The District Court wrongly dismissed plaintiff's Count One - Wrongful Discharge - as duplicative of the Age Discrimination Claim - the "public policy" a Civil Right Constitutional violation is not embodied in the NJLAD or the ADEA.

A finding in Plaintiff's favor in Count One - a wrongful Discharge will automatically impact the Age Discrimination Claim under the JNLAD - which finds and unlawful employment practice if one is bared discharged or forced to retire due to unlawful considerations, or if one is constructively discharged.

Plaintiff maintains an agency relationship existed between him and the E.E. O.C. and for that reason Count Two - Negligent misrepresentation claim is valid.

Defendants Are Not Entitle To Summary Judgment On Plaintiff's Claims in Count Three. Violation of the New Jersey Law Against Discrimination and Age Discrimination in Employment Act (ADEA).

A) Defendants restricted standard that plaintiff must have been discharged in order to prove a prima facie case is in error. As applied to ADEA cases, plaintiff established a prima facie case by showing that he is over 40, he is qualified for position in question, he suffered an adverse employment decision, and he was replaced by a sufficiently younger person to create an inference of age discrimination ADEA of 1967 84 (a) 29 U.S. C.A. 8623 (a)

B) Plaintiff has met that standard (Brief in Opposition to Defendants Motion for Summary Judgment) Ja85

C) The Court and the Defendants admitted that the Misrepresentation Claim (if proven) evidenced pretext and Plaintiff laid claim to those as Admission on File - Motion for Reconsideration Ja25.

Argument
Defendants are not Entitled to Summary Judgment as a Matter of Law

The District Court wrongly dismissed plaintiff's Count One was a "Wrongful Discharge Claim" Ja 160. It specifically alleged that the transfer of Appellants' employment was unethical and an unlawful infringement of Plaintiff's constitutional rights of liberty and freedom of choice. Ja 161 2d sen. Respondents answered that they, "neither admit, nor deny the remaining allegations in paragraph 8 (referenced above) as set forth legal conclusions or argument to which no pleading is necessary. Ja 171 "Answer".

This Constitutional question is therefore properly before this Court. It was in the Appeal on page 3 at question 5. Did the District Court incorrectly decide the facts of your case? If so, what facts? The legality of the transfer was challenged under

Federal Constitutional Law. The matter appeared as Court One - Wrongful Discharge.

The initial Interrogatories to Plaintiff at #19 Directs: "Set forth with specificity each and every fact that supports your allegation in paragraph 8 (incorrectly designated #7) of the First Count of the Complaint that "Plaintiff also contests the legality of transferring his employment to a competitor company. Response (a) It is the Plaintiff's belief that only property rights and ownerships can be transferred by Unison to ENSR. People are not chattel. The Thirteenth Amendment to the United States Constitution prohibits involuntary servitude. Therefore, Plaintiff maintains his employment could not have been transferred without his agreement and permission.

The public policy violation was argued below in Plaintiff's (Brief in Opposition to Defendants Motion for Summary Judgment) Ja 89 III. PLAINTIFF CAN ESTABLISH A WRONGFUL DISCHARGE CLAIM. Ja89.

> Count One of plaintiff's Complaint alleges that his termination was a wrongful discharge in violation of public policy. Defense council insists that the public policy to which plaintiff points is grounded in alleged unlawful discrimination, and therefore is duplicative of his direct claims under NJLAD and/or ADEA. Plaintiffs public policy plan is however, distinct from his age discrimination claim. An employee who is wrongfully discharged, may maintain a cause of action in contract or tort, or both. An action in contract may be predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980) citing Vasquez v. Glassboro Services Inc. 83 N.J. 86 (1980). The Pierce Court stated that the source of public policy includes legislation, administrative rules, regulations or

decisions, and judicial decisions. Plaintiff calls into question the propriety of defendant's attempt to compel Plaintiff to transfer to a competitor.

PLAINTIFF'S INITIAL INTERROGATORIES TO DEFENDANTS SOUGHT TO ESTABLISH THE LEGAL BASIS FOR THE TRANSFER.

On Page 6, #11 Question: Set forth each and every fact that support the legal basis for the Union Carbide/Unison decision to transfer employees of Unison to ENSR as a result of the "Divestiture of the Unison Retrofill Service Business" agreement. #11 Answer: See General Objection No. 4. Further objection to the extent that this interrogatory assumes that there must be a "legal basis" for the Union Carbide/Unison decision top transfer employees of Unison to ENSR.

PLAINTIFF BELIEVED THAT THE LEGALITY OF THE TRANSFER WAS DETERMINATIVE OF THE WRONGFUL DISCHARGE CLAIM.

Plaintiff's (Reply to defendant in Brief in opposition to Plaintiff's motion of reconsideration). Ja 10.2dpar. Points out that "The first Count of Plaintiff's Complaint challenges the legality of the forced transfer to ENSR. Complaint at #8. This is also a material fact in dispute and goes to the legality of the transfer of Plaintiff. It was also pointed out that "The Court", in McKenna 32 F. At 825-840 directed that "Plaintiff's claim for emotional distress damages are to be reinstated on remand, since they have been dismissed "contrary to law" 28 USC @636 (b) la.

The Order Ja6 of March 31, 1995, which denied plaintiff's motion for reconsideration stated that, "Plaintiff, having failed

to indicate any dispositive factual matters or controlling decisions of law overlooked by the Court in its November 30, 1994 determination as prescribed by General Rule 121; and the Court in its November 30, 1994 determination as prescribed by General Rule 122; and the Court being satisfied that its previous decision was comprehensive and accurate. It is on this 31st day of March, 1995 - Ordered that Plaintiff's motion for reconsideration be denied. Plaintiff appeals the order of March 31, 1995 denying reconsideration and the summary Judgment of November 30, 1994. The letter opinion filed on November 30, 1994 in support of the Summary Judgment Order erroneously interpreted the statues and cases to dismiss Plaintiff's Wrongful Discharge Claim (Letter Opinion) Ja44.

"Plaintiff contends that his termination was a wrongful discharge in violation of New Jersey public policy. Defendants argue that the public policy, if any, upon which Plaintiff argues that claim is the selfsame policy which rails against unlawful discrimination, and which has been embraced by the New Jersey legislature in the Law Against Discrimination in Employment Act. The court so finds and accordingly, plaintiff's wrongful discharge claims are dismissed as duplicative of his age discrimination claims. See Butler v. Sherman, Silverstein & Kohl, 755 F. Supp. 1259, 1263-65 (D.N.J. 1990) (no reason to create "Public Policy" claims duplicative of NJLAD prohibitions);

As was pointed out in Plaintiff's Brief Ja 89 Butler v. Sherman, Silverstein & Kohl, P.C., 755 F. Id. The NJLAD claim preempted her common law claim for wrongful discharge, because her common law claim, like her NJLAD claim, was also based on racial discrimination grounds. Plaintiff's Public Policy Claim is not duplicative of his NJLAD Claim since Constitutional Rights are not specifically addressed in the NJLAD.

"The common denominator in these cases is the existence of a specific expression of public policy in a statutory or constitutional prohibition." Guidance v. Drew Chem. Corp., 210 N.J. Super. 32, 509 A 2d200, 202 (App Div. 1986) quoting Pierce Id. In Radwan v. Beecham Laboratories 850 F2 147 (3D Cir. 1988) reh'd denied (Jul 27, 1988) applying Fed And N.J. law the third circuit found that even in the absence of a state public policy, a discharge which violated federal public policy would support a claim for wrongful discharge. Lutz v. Royal Ins. Co, did not embrace a Public Policy Claim. It involved defamation and interference with contract. 245 N.J. Super. 480, 586 A2d 278 (1991) and the only other case cited Geraghty v. Township of Berkeley Heights, 258 NJ Super. 350, 359 (Law Div. 1990) is covered by a separate statute which protects civil service employees, apparently Geraghty is a civil service employee . . . (the cause of action for a discharge violative of state law or public policy . . . is only recognized within the private employment relationship . . .) The public policy was not applicable to his civil service employment. (Letter Opinion) Ja 45.

If this Honorable Court finds that joining an employee to a personal property transfer of Asset Purchase Agreement violates appellants Civil Rights protected by the U.S. Constitution, we respectfully request that the Summary Judgment entered for respondents be rescinded or reversed, and entry be made in favor of the appellant for the complaint of Count One - Wrongful Discharge.

August 17, 1995

Daniel P. Allen — Date

Proof of Service

I certify that on August 17, 1995, I mailed a copy of this brief and all attachments via first class mail to the following parties at the addresses listed below:

Mr. Alan G. Lesnewich
Collier, Jacob & Mills
580 Howard Avenue
Somerset, NJ 08873

Daniel P. Allen	August 17, 1995 Date

FILED
February 14, 1996

APPENDIX H - Order dated November 30, 1994

United States Court of Appeals
For the Third Circuit

No. 95-5292

DANIEL P. ALLEN

Plaintiff and Appellant

v.

UNISON TRANSFORMER SERVICES, INC.;
REED H. FREEMAN; UNION CARBIDE CHEMICALS
AND PLASTIC COMPANY, INC.

Defendants

PETITION FOR REHEARING
(FRAP 40 AND THIRD CIRCUIT LAR 35)

I express a belief, based on a review of prior relevant decisions, that the panel decision in this case is contrary to decisions of the United States Court of Appeals for the Third Circuit. Also, that consideration by the full court, is necessary to secure and maintain uniformity of decisions in this Court, to wit, the Court erred in resolving disputed issues of fact in this instant case as in Anthony J. Chippolini v. Spencer Gifts Inc. 814 F2d 893--wherein the Court of Appeal found, #(3) The District Court erred by resolving disputed issues of fact--

In the NOTICE OF REMOVAL at Ja 154 @4, Defendants state: In his complaint, plaintiff seeks to challenge the termination of his employment with defendant Union Transformer Services, Inc., alleging a number of counts, in the Transcript of Proceedings of the Motion for Summary Judgment Ja 350 Line 17 - Mr. Paterno: He (referred) refused to work for ENSR. He was, in effect, constructively discharged.

Line 19 - The Court: No, he in effect, left his employment: Whether or not he was constructively discharged is the question. Whether he was forced out of the employment, that is a different question. That is it, huh?

Mr. Paterno, Your Honor: It is our contention that there are still unresolved issues of fact. Particularly the motivating factors behind my client termination. The entire characterization of his termination, whether or not he was transferred, constructively discharged . . . that is still at issue . . . and whether or not plaintiff was replaced by 31 year-old Kevin Modic. Ja 346

A Wrongful Discharge sounds in violation of the NJLAD 10:5-12 which states: It shall be an unlawful employment practice or as the case may be, an unlawful discrimination: (a) For an employer, . . . to refuse to hire, or employ or to bar, or to discharge, or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . Ja28

The opposing factual contentions of Defendants are that Plaintiff Allen became an employee of ENSR despite efforts to convinced him that he was no longer a UNISON employee, plaintiff refused to accept that fact and ultimately voluntarily resigned from ENSR. "Plaintiff's claims of Wrongful Discharge by Unison was decided by the Court. Plaintiff, at Count One of his Complaint had alleged a Wrongful Discharge. Ja 159 in Response to Interrogatory #21 - ENSR did not market the

Unison Reclass 50 process after the divestiture, and consequently the Plaintiff would have no function in the ENSR organization. This transfer could also be construed as a constructive discharge. Ja 224 the Wrongful Discharge at #7. Defendant alleges that Plaintiff continued in and performed the conditions of employment satisfactorily until receiving a directive, dated August 19, 1991, prohibiting any further action as a representative or employee of "Unison." This instruction to no longer represent Unison was from "Unison" President Reed H. Freeman - Sa 66.

Document Request 1(g) Paragraph 22, included a Unison Employee Termination Form - Ja 268 (The reason for Termination is given as Voluntary Quit/Retirement) - which Plaintiff disputed. The Complaint Count One - Wrongful Discharge #21 - Plaintiff's salary was abruptly terminated on August 13, 1991, by Unison.

Despite efforts to convince them he was no longer a Unison employee, Plaintiff refused to accept that fact, and ultimately resigned from ENSR.

At Ja 346, #2 - Mr. Paterno: Your Honor, it is our contention that there are still unresolved issues of fact. Particularly the motivating factors behind my client's termination. The entire characterization of his termination, whether or not he was transferred, constructively discharged -- that is still at issue -- and whether or not plaintiff was replaced by 31 year-old Kevin Modic.

I also believe Plaintiff has established a prima facie case of age discrimination. Although defense counsel correctly states nobody said get lost, old man, there is (barely) rarely any concrete proof of a person's motivating factor. They don't manifest it verbally or orally. The (Tripodi) Chipollini case -- to satisfy this burden you need not require direct proof of age discrimination because it is often unavailable or difficult to find.

In the TRANSCRIPT OF PROCEEDINGS - SUMMARY JUDGMENT MOTION - Ja 350 Line #17 - Mr. Paterno: He refused to work for ENSR. He in effect was constructively discharged.

Ja 350 Line #19 - The Court: No. He, in effect, left his employment.

Ja 351 - The Court: All right. Thank you. I'll reserve decision.

Plaintiff had demanded a trial by jury on all contested issues of fact. By advocating Defendant's contention the Court had deprived Plaintiff of his Right to a jury trial on the contested issue of a Wrongful Discharge. The Court had stated the issue and decided it. In Chipollini v. Spencer Gifts, Inc. 814 F2d 893 (3d Cir) the Court of Appeals, en banc (found) at (3) the district court erred by resolving disputed issues of fact.

It is the Appellant's contention that the District Judge also erred in deciding the material fact as to whether he was constructively discharged, by way of salary termination (complaint #21). That issue of fact properly should have been reserved for a jury determination.

I also express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court in McKenna v. Pacific Rail Service 32F 3d 820 (3d Cir 1994) Ja 38 and Defendant's Amended Brief p11.

The panels decisions is contrary to the decision of this Court in McKenna v. Pacific Rail Service given the similarity of circumstances and the dissimilar outcome; McKenna remanded for trial. Allen summary judgment for Defendants and dismissal of Allen's claims against defendants. In the interest of equality of treatment, this Court's review and rehearing should be affirmed. In the interest of maintaining the Court's continuity of findings, we ask for your affirmation of this review.

The similarity exists because:

1. Appellants in both cases were suing their former employer for Age Discrimination in violation of the New Jersey law against discrimination.

2. Federal Court in both cases was sitting in diversity and was not free to impose its own view of w hat state law should be. Federal Court sitting in diversity must apply state substantive law.

3. The same District Judge sat on both cases.

4. The Panel members wrote opinion and dissentings opinions.

The Transcript of the Proceeding of the Summary Judgment Motion - Sept. 26, 1994 - Ja 343 Line 24 - Mr. Lesnewich: The law is, as your Honor is well aware, the standard right now. Although it is revolving, we pointed out of the most recent opinions, which would be the McKenna case and the Fuentas case. The Third Circuit ruled in the context of a summary judgment motion in which the employer was granted summary judgment. It takes a heck of a lot more than saying we think there is a fact dispute that the jury should be able to consider in order to oppose a motion for summary judgment.

Ja 344 Line 7 - It is our position, based on the uncontroverted factual record before Your Honor, that is, in fact, all the Plaintiff is saying. There is nothing challenging to the extent Fuentes requires the legitimate business reasons offered by Mr. Freeman by way of his certification.

Ja Line 13 - Lesnewich: Therefore, the claims for age discrimination simply can't survive.

Defendants have pointed to the McKenna case as a recent opinion, (Ja 344) for "the standard right now, although it is evolving." Following that direction Appellants will examine that case and compare his situation to the pertinent analysis which is applicable to his case and contrary to what Defendants have maintained is applicable.

1A. The Prima Facie Case o f Age Discrimination
McKenna p. 827 - The New Jersey Court has adopted the McDonald Douglas framework although it had noted that it had never "embraced the McDonald Test literally, invariably or inflexibly." Grigoletti v. Ortho Pharm. Corp. 118 NJ 89 97-98, 570 A 2d (1990)

Instead, the New Jersey Supreme Court has noted a willingness, and has instructed New Jersey Courts in general, to treat the McDonald Douglas test as "only a general framework for analyzing unlawful discrimination claims" which "must be modified where appropriate." Erickson v. Marsh & McLennan Co. Inc. 117 N.J. 539, 569 A 2d 793, 799 (1990)

B. The Prima Facie Case of Age Discrimination
according to *Defendants* (Amended Brief p. 1 2) Plaintiff Cannot prove a Prima Facie Case of Age Discrimination

To make out a prima facie case of age discrimination, plaintiff is required to show that (1) he was a member of the protected class; (2) he was qualified for the position from which he was discharged; (3) he was discharged despite his qualifications; and (4) he was replaced by a person sufficiently younger to permit an inference of age discrimination. Healy, 860 F 2d at 1214. Reply Brief of Appellant - page 3

This argument of Defendants as to a Prima Facie Case under New Jersey Law is contrary to New Jersey Law.

(A) *Defendants* restricted standards that Plaintiff must have been discharged in order to prove a prima facie case is in **error**. Plaintiff establishes a prima facie case by showing that he is over 40, he is qualified for position in question, he suffered an adverse employment decision, and he was replaced by a sufficiently younger person to create an inference of age discrimination ADEA of 1967 #4 (a) 29 U.S.C.A.

Appellant in Reply to Defendant's Brief in Opposition to Plaintiff's Motion For Reconsideration - claims that the "Court did, in fact assume (a prima facie case of unlawful discrimination) that granted the controlling law should be what the Supreme Court has decreed, not as interpreted by the defendants. At page Ja 10 in that Brief - referencing McKenna" and Judge Mansman comments on N.J.R. Evid. 301 regarding presumption the New Jersey rule creates an issue for the jury. Circuit Judge Lewis commenting on N.J.R. Evid. 301 Specifically, it states that "if evidence is introduced tending to disprove the presumed fact, the issue shall be submitted to the trier of fact for determination unless the evidence is such that reasonable persons would not differ as to the existence or non-existence of the presumed fact, and as Appellant stated in the Reply Brief Ja

10. Obviously under the foregoing Fed and New Jersey Rules of Evidence a factual issue has been created.

Because of the establishment of the prima facie case by Appellant and the requirement that this case be decided by New Jersey Law Appellant Petitions the panel that on rehearing the Judgment Order be vacated.

Appellant would also suggest that the Panel should consider if in fact there ever was any justification for Defendant's submission of a Summary Judgment Motion since he had no case law to back up his motion.

Respectfully submitted,
Daniel P. Allen

This appeal involves a question of exceptional importance to wit: Whether 28 USC #2072 as emended procedural rules should deny appellant's rights under the Fifth Amendment to the United States Constitution to not be deprived of life, liberty and property without due process of law.

The term "due process" when applied to judicial proceeding, traditionally "means a course of legal proceedings according to those principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." Pennoyer vs. Meff 95 U.C. 714, 713 (1877)

The Supreme Court of the United States prescribes for the District Court of the US. The forms of process, writs, pleadings and motions and the practices and procedures in civil action at law, and whereas "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant, by Act of Congress June 19, 1934 (48 Stat 1064) presently found in 28 USC #2072, as amended procedural rules.

Appellant declares that he was injured in his property right when his labor was assigned to another without his assent, and absent any successorship in the corporation involved (reply brief of appellant page 4) Argument defendants are not entitled to summary judgment as a matter of law. "It should therefore follow that an employee who suffers the loss of his job has been injured in his property." (McNulty vs. Borden Inc., 1979 ED Pa., 474 F. Sup. 1111 1972 Docket #27) Plaintiff's Wrongful Discharge Claim, therefore sounds in property rights.

Appellant declares that his Constitutional Rights were violated by denial of a jury trial. This course of action for violation of his substantial rights as protected by the Constitution, the Supreme Law of the Land, did not rest on a "fact" but the violation of his rights by a legal wrong. This action was dismissed without a decision on a question of law, by the court. As stated under 28 USC 2712, "It should be remembered that Rule 56 is not merely a dilatory or technical procedure, it affects the substantial rights of the litigants." Including the rights to litigate any other issues which were alleged in the complaint not fully briefed but nonetheless would be Res Judicated, Since the defendants failed to address these other issues in the complaint they must stand if the facts establish a claim for relief under any legal theory. See Dussony vs. Gulf Coast Inv. Co., 660F 2d 594, 604 (5th Cir 1981) and since "the party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issue of material fact" Celotex Corp. Vs Katrell 477 US 317, 323 (1986) By offer of inapplicable cases and statutes, defendants failed to meet their S.J. burden.

> Even where no evidence is presented in opposition to the motion, summary judgment should not be granted if the evidence in support of the motion is insufficient.

Hoover vs. Switlik Parachute Co., 663 F 2d 964 (1962) (Ja 79) Appellant claims insufficiency of the evidence since defendants have failed to raise a legal defense, they are not entitled to judgment as a matter of law. (Fed Rule CIV.P. 56 (e) 1994 Ja 79) Informal Brief P4 #6 "On a motion for summary judgment if a question of fact exists concerning existence of a defense issue cannot be determined on affidavit." (Peterson vs. US CA NJ 1982, 692- F 2d 943) Plaintiff has advanced a question of fact as to the legality of the defense. The Asset Purchase Agreement without any authenticity was the only evidence offered in support and denial of the unlawful termination which Plaintiff has alleged. Defendants are not entitled to summary judgment due to the unresolved issue of Law and lack of admissible evidence.

FILED
August 5, 1993

APPENDIX I - Complaint

Daniel P. Allen, Pro Se
1713 Summit Avenue
Union City, N.J. 07087

Daniel P. Allen

Plaintiff,

V.

UNION TRANSFORMER SERVICES, INC. REED H. FREEMAN, PRES. UNISON CARBIDE CHEMICALS & PLASTICS CO., INC.

Defendants.

SUPERIOR COURT OF NEW JERSEY

CIVIL ACTION

Docket No. Ber-L-7846-93

COMPLAINT AND JURY DEMAND

Plaintiff, residing at 1713 Summit Avenue, Union City, N.J., alleges:

NATURE OF THE CASE

1. This is an action bought by Daniel P. Allen against Plaintiff's former employer, Defendant Unison Transformer Services Incorporated, 1338 Hundred Oaks Drive, Charlotte, N.C., 28217, a subsidiary of Union Carbide Chemicals and Plastics Company, 39 Old Ridgebury Road, Danbury, C.T., 06817, UCCP, and Reed Freeman, President - Unison Transformer Services Inc. and Vice President of Union Carbide Chemicals

and Plastics Company: alleging a violation of New Jersey Law Against Discrimination - Age Discrimination in Employment Act of 1967 as amended (ADEA) and Wrongful Discharge. Plaintiff seeks compensatory and punitive damages, reasonable attorney's fees and costs and such other relief as the court deems appropriate.

PLAINTIFF

2. Plaintiff was offered employment by Mr. F.J. Graham, former V.P. Marketing for Unison, on October 7, 1985 as a Regional Sales Executive (Account Executive); based in the Union City Area covering an area of New Jersey, Easter and Central Pennsylvania and Delaware. This territory was later extended to cover a wider Northeastern states area. Plaintiff fulfilled all the requirements of the position and received passing performance reviews and recognition of outstanding service through numerous awards for exceptional performance, including the initial contract for Trans-End disposal of transformers in 1987.

DEFENDANTS

3. UNISON, a wholly owned subsidiary of Union Carbide Chemicals and Plastics Corporation; Mr. Reed H. Freeman, President Unison, and Vice President of Union Carbide Chemicals and Plastics Corporation (UCCP); and Union Carbide Chemicals and Plastics Corporation (UCCP). UCCP conducts business in the State of New Jersey, in Bound Brook, NJ. Defendant Unison employed Plaintiff and provided a Sales Office and secretary service at Meadows Office Complex, 201 Route 17, North, Rutherford, NJ from November 1985 until August 1991. Plaintiff conducted business for Unison at this location, which was designated as a Sales Office in Unison's

Sales Literature. UCCP called "Defendant" interviewed for position and recommended for hire "Plaintiff" Daniel Allen as a Regional Sales Executive, for their (UCCP's) newly established subsidiary Unison. Reed H. Freeman, called "Defendant" is President of Unison and a Vice President of UCCP. In his capacity as President of Unison, Mr. Freeman participated in, authorized or ramified the misconduct Plaintiff alleges below.

COUNT ONE - WRONGFUL DISCHARGE

4. The facts alleged above are incorporated by reference as if fully restated.

5. Defendant Union Carbide Chemicals and Plastics Company through its Professional Employment Dept. recommended Plaintiff be hired as a "Regional Sales Executive" - Environmental Services. This written offer of employment was made by former Vice President/Marketing for Unison, Mr. F.J. Graham on Oct. 7, 1985. The correspondence from him further stated the position would be based in the Union City area and cover New Jersey, Eastern and Central Pennsylvania and Delaware. The advertisement for this position which appeared in the Newark Star Ledger in July, 1985 clearly stated no relocation was necessary.

6. Plaintiff accepted Defendants "UNISON" and "UCCP" written offer of employment and gave Defendant sufficient legal consideration for the offer it made by signing an "Employee Agreement" relative to confidential technology and patents.

7. Plaintiff continued in and performed the conditions of employment satisfactorily until receiving a written directive, dated Aug. 19, 1991, prohibiting any further actions as a representative or employee of "UNISON." This instruction to

no longer represent Unison was from "UNISON" President Reed H. Freeman.

8. In a "Statement of Position of Unison Transformer Services, Inc." Defendant Reed H. Freeman, President Unison, states "On August 7, 1991, Mr. Allen and a large number of Unison employees were transferred in a sale of business and related assists to another company. (ENSR)." *Plaintiff disputes a "Sale" of a business took place since Unison continued operating. Plaintiff also contests the legality of transferring his employment to a competitor company.*

Unison had no divisional components. It operated as a single entity, performing various transformer services. Plaintiff contends that Unison therefore only divested its Retrofill service contract, Patent rights, and various fixed assets. Plaintiff's position as an Account Executive did not entail the performance of these service contracts. Plaintiff also contends since Unison remained in the transformer destruction and retrofit service, Unison should have retained Plaintiff in his position. Unison's attempt to shift Plaintiffs' employment to a competitor company was unethical and an unlawful infringement of Plaintiffs' constitutional rights of liberty and freedom of choice. This attempt also violated established Unison Personnel and Employment Practices of fair and equitable treatment of its employees. Plaintiffs' attempts at obtaining a severance package from Unison were rebuffed. Instead he was directed to competitor ENSR for his severance claims. Yet his replacement in the position he was forced out of was promised a retention bonus of two months pay, plus reduction in force and severance pay in November 1991 (three months after Plantiffs' dismissal), to remain in Unisons employ until the end of 1992.

In view of the promises made to Plaintiffs' replacement regarding termination compensation, Plaintiff charges he was treated unfairly, and inequitably. It should also be noted that financial journals had published news articles which indicated multi-million dollar charges were taken against earnings by parent company, Union Carbide, as a cost of dismissing employees. More specifically, the Wall Street Journal on May 13, 1991 reported Union Carbide planned to take charge of $14,000,000.00 due to the divestiture of the transformer Retrofill service, but noted the company wouldn't disclose specific terms of the transaction. If a Sale of business took place as Defendants claim, the $14,000,000.00 charge against earnings due to the transaction (which included no employee dismissal costs) should be explained by Defendants. Since Plaintiff was adversely affected by the confidential agreement between Union and ENSR, he is entitled to disclosure of such agreement.

9. Defendant Reed H. Freeman is also aware that UNISON has had a legal relationship with ENSR. UNISON and ENSR were/are competitors in the Environmental Services Business. Both ENSR and UNISON offered customers a process for decontamination of polychlorinated biphynels (PCB) from electrical transformers.

10. The UNISON process for decontamination of electrical transformers was called RECLASS 50. the ENSR process of decontamination of electrical transformers was called SYSTEM 50.

11. Though similar in name, the processes differed greatly.

12. Plaintiff represented to customers the superiority of the UNISON RECLASS 50 over competitors (ENSR) SYSTEM 50. (Unison having produced technical papers to this effect).

13. Upon receiving literature from ENSR containing a table of organization which presented Plaintiff as selling the former competitors "SYSTEM 50" process for PCB removal Plaintiff rightly and conscientiously rejected employment with the former Unison competitor for ethical and legal reasons.

14. Plaintiff notified Defendant Reed H. Freeman in writing on Aug. 23, 1991, that Plaintiff still considered himself a Unison employee. Plaintiff has been ready, willing and able to perform the condition of such employment.

15. It was the obligation both legally and ethically of Unison and UCCP to maintain Plaintiff in the position to which Plaintiff was hired and not forfeit Plaintiff's employment and ethics due to a litigation Plaintiff was not a party to, or sell a service Plaintiff did not believe he could legally offer.

16. Plaintiff reasonably believed such conduct by Unison as shifting his employment to a competitor, ENSR, clearly violates Union Carbide Corporation Policy on "Business Integrity and Ethics" and its Governing Principal "The fundamental principal governing Corporate actions and the actions of employees and officers is that ethics and business are inseparable at Union Carbide, and that no business objective can be achieved without following the high-test ethical standards and complying with all the local national laws and regulation that pertain to our operation.

17. It was the obligation of Vice President, Reed H. Freeman to uphold corporate policy which pertains to ETHICS IN BUSINESS.

18. Plaintiff had not given Defendant permission to transfer his employment to competitor ENSR.

19. Defendants Unison and Reed H. Freeman materially breached the employment agreement with Plaintiff by the unethical conduct of expecting Plaintiff to sell a competitors product and by transferring Plaintiff to a competitor company. Defendant Reed H. Freeman failed to respond to Plaintiff's letter in which Plaintiff communicated he still considered himself a Unison employee and wherein he requested a severance package.

20. Plaintiff was hired as a Professional Employee and had reason to believe his employment would be treated in a professional manner.

21. Plaintiff's salary was abruptly terminated on August 13, 1991.

22. As a result of Wrongful Discharge and Breach of Personnel Policies by the Defendants, Plaintiff suffered economic loss, loss of employment and emotional stress. Defendant UCCP is vicariously liable for the misconduct of Reed H. Freeman and Unison.

Wherefore, Plaintiff demands judgment against Defendants for back pay, compensatory damages, legal fees, the cost of suit and such other relief as the court deems appropriate.

COUNT TWO - NEGLIGENT MISREPRESENTATION

23. The facts alleged above are incorporated by reference as if fully restated.

24. The Plaintiff filed with the New Jersey Division on Civil Rights a charge of Age Discrimination in Employment since his position was shifted to a younger, less qualified individual, who did not have to meet the company established requirements for the position while Plaintiff was forced out. Such employment practices are prohibited by and are in violation of the Age Discrimination in Employment Acts of 1967, as amended (ADEA).

25. Defendant Reed H. Freeman, President of Unison and Vice President of Union Carbide responded to the Equal Employment Opportunity Commission (EEIC) charge #1719220303, with a Company Position Paper signed by Defendant Freeman, notarized by Jeanne M. Hurgan and submitted by UCCP counsel Richard P. Lawler.

26. The Company Position Paper contained false and misleading information and representation which were relied on as evidence in support of Unison's denial of the EEOC charge.

27. Plaintiff was identified in Defendant Freeman's Company Position Paper as having been hired as a "salesman." This misrepresentation was accepted as evidence. This was a deliberate misrepresentation, Defendant Freeman knew that by inferring Plaintiff was not removed from a position he was hired for, the EEOC would not readily see the displacement and replacement of Plaintiff by a younger individual in a position he had held since joining UNISON in 1985.

28. Defendant Freeman in his notarized statement further declares "One of Unison's principal businesses, the PCB Retrofill Business ("Business") was sold to ENSR Corporation a wholly owned subsidiary of American NuKem Corporation.

Neither Unison or UCCP has any legal relationship with either NESR or American NuKem."

29. Plaintiff declares the preceding statements by Defendant Freeman to be negligently misleading. The fact is Unison was managed as a single entity, providing transformer services with no autonomous divisional components. Plaintiff also states Unison and UCCP had a legal relationship with ENSR a subsidiary of American NuKem. There was litigation pertaining to Patent Infringement by ENSR instituted by Unison. Furthermore as competitors, ENSR and Unison would be enjoined by Anti-Trust laws which prohibit "restraint of trade" from creating a monopoly, price fixing or allocation of markets.

30. Plaintiff asserts Defendant Freeman was aware of such ruling and therefore what Unison sold to ENSR was in effect a right to Unison's Retrofill RECLASS 50 process and assignment of customers open contracts.

31. Plaintiff became cognizant of such facts when ENSR expecting Plaintiff would accept employment with them sent a table of organization which indicated Plaintiff would henceforth be selling the SYSTEM 50 process for PCB decontamination. This SYSTEM 50 process is UNISON's former competitors ENSR) Process, which Plaintiff while in UNISON's employ has to present to customers as an inferior and potentially dangerous alternative, compared to the UNISON RECLASS 50 process.

32. Defendant Freeman, President Unison, states in Unison's Company Position Paper, "The Marketing and Sales organization serviced the Business sold to ENSR as well as the two other businesses retained by Unison (the Transcend and the PCB Retrofill businesses). On the date of the divestiture based upon geographic location, level of experience in sales and marketing

and the intensity of their experience in either the Business divested or the two businesses retained, UNISON offered and ENSR accepted for employment five employees..." "One of these was Mr. Allen." On and after August 8, 1991, Mr. Allen was an employee of ENSR." Plaintiff asserts all preceding statements made by Defendant Freeman are false and negligent misrepresentations of the "facts."

The Marketing and Sales Organization did not "service" the Business sold to ENSR. The "service" was performed by the approximately 135 other employees from the Regional Service Centers, comprised of Technicians, Regional Coordinators, from each regional area, these employees were transferred to ENSR to "service" the open or incompleted Retrofill Contracts. It is important to note that ENSR, as a competitor had a full complement of Sales Personnel currently selling their SYSTEM 50, and therefore had no need to additional sales personnel, since the UNISON RECLASS 50 WOULD NOT BE MARKETED BY ENSR.

As to the statement by Defendant Freeman that "On and after August 8, 1991, Mr. Allen was an employee of ENSR," this is another instance of negligent misrepresentation. Employment Application sent by ENSR to Plaintiff was neither sought, completed, or returned by Plaintiff to ENSR. Defendant Freeman was aware of this since Plaintiff communicated this in writing, and also advised Defendant, that Plaintiff still considered himself a UNISON employee. Plaintiff was forced out of his position and terminated by Unison after having been instructed to send business files to home of his replacement.

ENSR did not accept five employees as Mr. Freeman claims as Account Executives. Only four were accepted, on of which was Plaintiff. Two of the remaining three employees who went to

ENSR as Account Executives were newly appointed by Unison in April 1991 with Mr. Modic. The one remaining Account Executives' sales territory had recently been assigned to Plaintiff for more effective coverage. Thus it remains no other Account Executive in the protected age group with length of service was transferred.

33. Not only did Defendant Freeman engage in negligent misrepresentation as regards Plaintiff Allen, he also and particularly exhibited like misrepresentation pertaining to Mr. Allen's replacement in UNISON's sales organization. This particular individual who replaced Mr. Allen as refereed to was the "backbone of the Retrofill Business," (the business allegedly sold to ENSR), said individual supervised the technicians transferred to ENSR, scheduled their work, and performed other duties in his position as Field Operations Coordinator, his efforts insured the success of the Retrofill Business. Clearly Plaintiff's replacement experience was in the Business divested, having spent his entire employment (except for the prior four months during which time was announced ENSR would assume the Retrofill Contracts) as a Process Engineer and Senior Process Engineer. The prior statement again indicated misrepresentation on Defendants part since Plaintiff's replacement in sales clearly had an "intensity of experience in the Business divested" based upon which "UNISON offered and ENSR accepted for employment," to use Defendant's words, was the criteria used to determine who would be shifted to ENSR.

34. The above "facts" contradict the contention by UNISON which was relied on in the determination by EEOC, that Unison's selection of the individual to be retained in it's employ was based solely on the value of the charging party to the Business divested.

35. Defendant Freeman also negligently misrepresented that Plaintiff "Mr. Allen worked for Unison using the Company's office in Allentown, Penn." As previously state, Plaintiff was furnished a Sales Office at the Meadows Office Complex in New Jersey. It was Mr. Allen's replacement who worked out of the Allentown office, and that office was on of UNISON's assets purchased by ENSR.

36. Plaintiff charges Defendant supplied inaccurate data which amounted to Negligent Misrepresentation which was relied on in determining the validity of Plaintiff's Claim of Violation of NEW JERSEY Statues. As a result, Plaintiff suffered economic losses with respect to Plaintiff's employment, including lost pay, and employment opportunities. Defendant UCCP is vicariously liable for the negligent misrepresentation of the Defendant Reed H. Freeman.

WHEREFORE, Plaintiff demands judgment against Defendants Union Carbide Chemicals and Plastics Company, Unison, and Reed H. Freeman, President Unison, Vice President UCCP, for compensatory damages, the cost of suit, and such other relief as the court deems appropriate.

COUNT THREE - VIOLATION OF NEW JERSEY LAW AGAINST

DISCRIMINATION - AGE DISCRIMINATION IN

EMPLOYMENT ACT OF 1967 AS AMENDED (ADEA)

37. The facts above including those in Count One and Count Two are incorporated by reference as if fully restated.

38. Plaintiff declares he was forced out of the position he was hired for to insure a position for a younger employee. The individual, Mr. Kevin J. Modic, who replaced Plaintiff, being thirty-one years old at the time, was not in the protected class group. He would have transferred with other Retrofill employees he supervised had he not been placed in Plaintiff's position.

39. Said individual who replaced Plaintiff as an Account Executive Sales Professional, had no prior experience in sales, did not have the minimum eight years of sales experience or the preferred Technical Engineering Degree, which requirements Plaintiff had to meet in order to qualify for consideration by Union Carbide for the advertised position he was hired to fill.

40. Unison's Employee Handbook of Personnel Policies and Practices - Policy No. II-8, Page 1 of 1, Effective 4-1-89, defines Company Service as a measure of your time as an employee of Unison, with a primary purpose of establishing a relationship between you and other employees based upon you respective dates of hire. Company Service is calculated from the first day that you started working as an employee of Unison. Plaintiff's employment commenced on October 15, 1985. The individual identified as shifted into the plaintiff's position became a Unison employee in February 1986. Plaintiff had seniority in Unison's employ.

41. Defendant Unison additionally offered Plaintiff's replacement a "Retention Bonus" in Nov. 1991 only three months after he replaced Plaintiff as Account Executive.

42. Plaintiff maintains the only consideration he was given was an offer of an illegal position with a competitor. No severance or reduction in force allowance, which was promised to his replacement in November 1991, was offered or give to Plaintiff.

43. As a result of Unison's violation of New Jersey Law against Discrimination and ADEA of 1967 as amended, Plaintiff suffered mental and emotional injury, loss of employment and employment opportunities. Defendant UCCP is vicariously liable for the unlawful termination of Plaintiff Daniel P. Allen by Reed H. Freeman, President - Unison Transformer Services.

Wherefore, Plaintiff demands judgment against Defendants Unison, Union Carbide Chemicals and Plastics and Reed H. Freeman - President Unison Transformers Service Inc. to rectify the injuries and injustices requests damages be awarded for back pay and make whole relief, compensatory damages, the cost of suit and such other relief the court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all contested issues of facts.

NOTICE OF RELATED ACTION

I certify that the matter in controversy is not the subject of any other action pending in any court or arbitration proceeding, nor is any other action or arbitration proceeding contemplated. There are no other parties known to Plaintiff who should be joined in the action.

I certify that the foregoing statements made by me about related actions are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Daniel P. Allen
Plaintiff

FILED
September 15, 1993

APPENDIX J - Answer

COLLIER, JACOB & MILLS
A Professional Corporation
580 Howard Avenue
Somerset, New Jersey 08873
(908) 560-7100
Attorneys for Defendants
Attorney of Record: CHM 9508

DANIEL P. ALLEN,	:	UNITED STATES DISTSRICT COURT
Plaintiff,	:	DISTRICT OF NEW JERSEY
		CIVIL ACTION NO. 93-3747
v.	:	(NHP)
UNISON TRANS-FORMER SERVICES, INC.	:	
REED H. FREEMAN, PRES. UNISON,	:	**ANSWER**
UNION CARBIDE CHEMICALS & PLASTICS, CO., INC.	:	
Defendants	:	

Defendants, Union Carbide Chemicals and Plastics Company Inc., a New York Corporation with its principal place of business at 39 Old Ridgebury Road, Danbury, Connecticut,

Unison Transformer Services, Inc. (incorrectly designated in the Complaint as "Union Transformer Services, Inc."), a Delaware Corporation having a principal place of business at 1338 Hundred Oaks Drive, Charlotte, North Carolina, and Reed H. Freeman, a resident of the state of Connecticut, by way of answer to the Complaint and Jury Demand, say:

1. They neither admit or deny the allegations contained in paragraph 1 as they set forth jurisdictional information and legal conclusions to which no responsive pleading is necessary.

PLAINTIFF

2. They deny the allegations contained in paragraph 2, except to admit that plaintiff was offered employment as a Regional Sales Executive on October 7, 1985 for an area covering New Jersey, Eastern and Central Pennsylvania and Delaware, that the territory was later extended to cover a wider Northeastern states area and that plaintiff's performance was satisfactory during his employment.

DEFENDANTS

3. They deny the allegations contained in paragraph 3 to the extent that they allege that any defendant participated in, authorized or ratified any misconduct with respect to plaintiff's employment, and admit the remaining allegations contained in paragraph 3.

COUNT ONE - WRONGFUL DISCHARGE

4. They repeat their responses to the allegations contained in paragraphs 1 through 3 as it fully set forth herein.

5. They deny the allegations contained in paragraph 5, except to admit that plaintiff was hired as a Regional Sales Executive, that he received a written offer of employment, and that his territory was to cover New Jersey, Eastern and Central Pennsylvania and Delaware. They are without knowledge or information sufficient to form a belief as to the allegations contained in the fourth sentence of paragraph 5.

6. Except to admit that plaintiff executed a Memorandum of Employee's Agreement, they neither admit nor deny the remaining allegations contained in paragraph 6 as they either set forth legal conditions to which no responsive pleading is necessary or reference documents, the content and language of which speak for themselves.

7. They deny the allegations contained in paragraph 7 except to admit that plaintiff was employed from October 1985 until August 7, 1991 when he was advised in writing that he had become an employee of ENSR.

8. They neither admit nor deny the allegations contained in the first sentence of paragraph 8 and refer to the referenced document for an accurate statement of its language and content. They neither admit nor deny the remaining allegations in paragraph 8 as they set forth legal conclusions or argument to which no responsive pleading is necessary. To the extent the remaining statements contained in paragraph 8 can be construed as allegations directed to any of these defendants, they are denied.

9. They deny the allegations contained in paragraph 9, except to admit that Unison and ENSR were entities selling competitor products/services in the environmental services field and that

ENSR and Unison offered services/products concerning the decontamination of PCBs with respect to electric transformers.

10. They admit the allegations contained in paragraph 10.

11. They admit the allegations contained in paragraph 11.

12. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12.

13. Except to deny that plaintiff had any ethical or legal reason to refuse employment with ENSR, they are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 13.

14. Except to admit that plaintiff sent defendant Freeman a letter dated August 23, 1991, they neither admit or deny the allegations contained in the first sentence of paragraph 14 and refer to the referenced document for an accurate statement of its language and content. They neither admit nor deny the allegations contained in the second sentence of paragraph 14, as they are not directed to the defendants.

15. They deny the allegations contained in paragraph 15.

16. They deny the allegations contained in paragraph 16.

17. They admit the allegations contained in paragraph 17.

18. They neither admit nor deny the allegations contained in paragraph 18 as they set forth legal conclusions to which no responsive pleading is necessary. To the extent the statement in

paragraph 18 can be construed as allegations against these defendants, they are denied.

19. They deny the allegations contained in paragraph 19.

20. Except to admit that plaintiff was hired as a Regional Sales Executive, they are without sufficient information to admit or deny the allegations contained in paragraph 20.

21. Except to admit that on August 7, 1991 plaintiff became an employee of ENSR, they deny the allegations contained in paragraph 21.

22. They deny the allegations contained in paragraph 22.

COUNT TWO - NEGLIGENT MISREPRESENTATION

23. They repeat their responses to the allegations contained in paragraphs 1 through 22 as it fully set forth herein.

24. Except to admit that defendants received notice that plaintiff had filed a Charge of Discrimination with the Equal Employment Opportunity Commission, they are without knowledge or information to form a belief as to the truth of the allegations contained in paragraph 24 as to the filing of a charge with the New Jersey Division on Civil Rights. They deny the remaining allegations contained in paragraph 24.

25. They admit the allegations contained in paragraph 25.

26. They deny the allegations contained in paragraph 26.

27. Except to admit that plaintiff was identified as a "salesman," they deny the allegations contained in paragraph 27.

28. They neither admit nor deny the allegations contained in paragraph 28 and refer to the referenced document for an accurate statement of its language and content.

29. They deny the allegations contained in paragraph 29.

30. They deny the allegations contained in paragraph 30.

31. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 31. They deny the allegation contained in the second sentence of paragraph 31, except to admit that System 50 and Reclass 50 were competitive processes.

32. They neither admit nor deny the allegations contained in the first sentence of paragraph 32 and refer to the referenced document for an accurate statement of its language and content. They deny the allegations contained in the second sentence of paragraph 32.

A. They deny the allegations contained in paragraph A.
B. They deny the allegations contained in paragraph B.
C. They deny the allegations contained in paragraph C.

33. They deny the allegations contained in paragraph 33.

34. They deny the allegations contained in paragraph 34.

35. They deny the allegations contained in paragraph 35, except to admit that plaintiff had an office in the Meadows Office Complex in Rutherford, New Jersey.

36. They deny the allegations contained in paragraph 36.

COUNT THREE - VIOLATION OF NEW JERSEY LAW AGAINST DISCRIMINATION - AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 AS AMENDED (ADEA)

37. They repeat their response to the allegations contained in paragraphs 1 through 36 as it fully set forth herein.

38. Except to admit that Kevin J. Modic was 31 years old and that his responsibilities after plaintiff became employed by ENSR included some of those that had been performed by plaintiff before he became an employee of ENSR, they deny the allegations contained in paragraph 38.

39. They deny the allegations contained in paragraph 39.

40. They neither admit nor deny the allegations contained in the first two sentences of paragraph 40 and refer to the referenced document for an accurate statement of its language and content. They admit the allegations contained in the third sentence of paragraph 40, they deny the allegations contained in the fourth and fifth sentences of paragraph 40.

41. Except to admit that Kevin J. Modic was offered a "Retention Bonus" in November 1991, they deny the allegations in paragraph 41.

42. They deny the allegations contained in paragraph 42.

43. They deny the allegations contained in paragraph 43.

FIRST SEPARATE DEFENSE

Plaintiff's Complaint fails to state a claim against these defendants upon which relief can be granted.

SECOND SEPARATE DEFENSE

Plaintiff has failed to mitigate his damages.

THIRD SEPARATE DEFENSE

Plaintiff was not discharged by these defendants, but voluntarily terminated his employment with ENSR, a non-party.

FOURTH SEPARATE DEFENSE

Plaintiff's claim for emotional distress is barred by New Jersey's Worker Compensation Act.

FIFTH SEPARATE DEFENSE

Defendants at all times complied with all state and federal laws with respect to plaintiff's employment.

WHEREFORE, Defendants respectfully request that the Court enter judgment in their favor dismissing the Complaint and Jury Demand together with costs and other relief.

COLLIER, JACOB & MILLS
A Professional Corporation
Attorneys for Defendants

By: _____
ALAN G. LESNEWICH
For the Firm

DATED: September 10, 1993